Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service	)	WT Docket No. 00-239
	)	
and the Federal State Joint Board on Universal Service	)	CC Docket No. 96-45

Comments of
The Rural Utilities Service

Introduction

The Rural Utilities Service (RUS), a rural development agency of the United States Department of Agriculture, actively supports and promotes the universal availability of a broad range of telecommunications and information services in rural America. The RUS Telecommunications Program provides technical assistance and financing to bring state-of-the-art telecommunications to rural areas.

RUS has been a long-time proponent of wireless technology as a rural telecommunications solution.[1] RUS was part of a coalition that won approval from the Federal Communications

1. *See Letter to Kansas Corporation Commissioners regarding GCC License Corporation's Petition for Designation as an Eligible Telecommunications Carrier,* dated November 3, 2000, for an elaboration of RUS views on fixed and wireless mobile (www.usda.gov/rus/telecom/telecomact/2000actdocs.htm). A Copy is also attached to this filing.

Commission (Commission) for using mobile telephone frequencies (from a cellular predecessor technology known as IMTS) for fixed station telephone service.[2] Recently, RUS has adapted its regulations so that providers other than local exchange carriers can receive financing for mobile service in rural areas.

Since the passage of the Telecommunications Act of 1996,[3] RUS has taken an active role in the Commission's implementation of the 1996 Act's universal service provisions.[4] Throughout this process, RUS has represented the needs and interests of all rural Americans, not just those currently served by RUS-financed companies and cooperatives. Likewise, in its written comments, RUS has focused on what is good for rural America, not just what is good for the entities to which RUS lends.

Background

On November 3, 2000, the State Independent Alliance and the Independent Telecommunications Group of Kansas (Independents) filed a joint *Petition for Declaratory Ruling* (Petition) with the Commission. The Independents want the Commission to find that a fixed, dialtone-based, local service, even when offered by a Cellular Mobile Radio Service (CMRS or cellular) carrier, is fixed service, and, as a consequence, is subject to regulation by the State of Kansas as local exchange service.[5]

In most circumstances, RUS would decline to comment on questions of regulatory jurisdiction. In this case, however, there are other concerns including universal service implications.

Divided Jurisdiction Can Create a "Split-Level Playing Field"

In order to comply with the Telecommunications Act of 1996, many new rules were needed to implement competition while preserving and advancing universal service. This responsibility fell largely to the Commission, which has proceeded under the guiding principles of competitive and technological neutrality. That is, the Commission has attempted to develop rules that do not favor a specific carrier or a specific technology. These principles are intended to promote a "level playing field" on which competitors could compete for customers. RUS has concerns

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2. IMTS stands for *Improved Mobile Telephone Service.* In the 1980s, the FCC began allowing IMTS spectrum to be used on a secondary basis for fixed station telephone service known as *Basic Exchange Telephone Radio Service* or BETRS.

3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §151 *et seq.* [hereinafter 1996 Act].

4. *See* www.usda.gov/rus/telecom/telecomact/act.htm where all RUS comments on the 1996 Act, universal service, and related issues can be found.

5. *See In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services,* Second Report and Order and Order on Reconsideration, WT Docket No. 96-6 (rel. July 20, 2000). The Commission ordered that it would review fixed or fixed/mobile wireless services provided by a Commercial Mobile Radio Service on a "case-by-case" basis to determine whether they were subject only to federal regulation as a mobile service or whether they were also subject to state regulation.

about a "split-level playing field" that can be created when competitors play by different rules because they are regulated by different bodies.[6]

For example, states have regulatory control over local exchange carriers (LECs) and can require them to meet service standards. Kansas requires its LECs to build and maintain their telephone systems so that every customer can achieve a minimum data performance of 19.2 kilobits/second on a dial-up circuit, and every customer has equal access to long distance carriers.

Unless otherwise determined by the Commission, CMRS is a mobile service regulated at the federal level so a state has no authority to set service standards. Cellular radio facilities can also be used to provide a "wireless local loop" as an ancillary service. The subject of this Petition uses analog cellular facilities to offer such a service in Kansas. Known as the *Basic Universal Service* (BUS) offering, it is designed to look and feel like an ordinary telephone by including features such as a simulated dial tone. While the BUS offering has some limited mobility, it is not comparable to typical cellular service. BUS is promoted as a fixed service and the provider represents it as an alternative to local telephone service.[7] The BUS cannot meet some of the state requirements for LECs, such as the 19.2 kilobit/sector rate required of LECs, but if the fixed service is regarded as a CMRS service, it does not need to.

The RUS has no objection to CMRS carriers offering such services. However, when such a service becomes eligible for universal service support without the obligations that apply to LECs, competitive and technological neutrality begins to erode. This course will devolve service and not evolve it, which is contrary to the 1996 Acts requirements. Under the 1996 Act, states designate which carriers are eligible to receive universal service support. Once designated as an eligible carrier, universal service support flows to the carrier that wins a customer if support is associated with that customer. If a cellular provider can obtain universal service support when it offers an ancillary wireless local loop service because regulatory requirements apply to some dialtone providers and not to others, a split-level playing field is created.[8]

Clearly, decisions that appear to be about regulatory jurisdiction have universal service consequences. In this case, when the Commission considers whether the BUS offering is fixed service and thus subject to state regulation, it should consider the competitive and universal service implications within that state so that it does not create a split-level playing field. If it does not there are two possibilities:

- Either the mechanism will not be technologically and competitively neutral or,
- States may be rendered powerless to set performance standards or raise the definition of universal service as provided for in the 1996 Act because the split-level playing field will drive the provision of universal service to the lowest common denominator.

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6. *See supra* note 1 for elaboration on this split-level playing field.

7. *See* www.cellularonewest.com/PressRelease/PressRelease3.asp.

8. Under Kansas law, a local exchange carrier offering a "wireless local loop' service would have to meet the 19.2 kilobit/second data performance requirement."

Conclusion

Regulatory jurisdiction should not provide competitive advantage. In a case such as this, the Commission will determine whether a "wireless local loop" offered over a cellular telephone system is a fixed service and thus subject to state regulation and performance standards as are similar services offered by non-CMRS carriers. In making that determination, the Commission should consider the competitive and universal service consequences at both the federal and state level. RUS recommends that the Commission approve the Independents' Petition to preserve and advance universal service, and ensure competitive and technological neutrality, in Kansas.

12/20/00

CHRISTOPHER A. McLEAN
Administrator
Rural Utilities Service

Date

The Honorable John Wine, Commissioner
Kansas Corporation Commission
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027

The Honorable Cynthia L. Claus, Commissioner
Kansas Corporation Commission
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The Honorable Brian J. Moline, Commissioner
Kansas Corporation Commission
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Subject: Docket No. 99-GCCZ-156-ETC
GCC License Corporation's Petition for
Designation as an Eligible Telecommunications
Carrier

Dear Commissioners:

The Rural Utilities Service (RUS or Agency), a rural development agency of the United States Department of Agriculture, actively supports and promotes the universal availability of a broad range of telecommunications and information services in rural America. The RUS Telecommunications Program provides technical assistance and financing to bring state-of-the-art telecommunications to rural areas.

Since the passage of the Telecommunications Act of 1996 (1996 Act),[1] RUS has taken an active role in the Federal Communications Commission's (FCC's) implementation of the 1996 Act's universal service provisions. Throughout this process, RUS has represented the needs and interests of all rural Americans, not just those currently served by RUS-financed companies and cooperatives. Likewise, in its written comments, RUS has focused on what is good for rural America, not just what is good for the entities to which it lends.

RUS strongly supports fair competition in all local service markets where it can be sustained without defeating the universal service principles of the 1996 Act.[2] RUS also strongly supports

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §151 *et seq.* [hereinafter 1996 Act].

2. Section 254(b)(2) provides that "(a)ccess to advanced telecommunications and information services should be provided in all regions of the Nation." Section 254(b)(3) provides that "(c)onsumers in all regions of the nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to

states' rights to preserve and advance universal service within their boundaries as provided under Section 254 of the 1996 Act.[3]

In this docket, a carrier seeks state universal service funds without intending to meet the data rate requirements established by Kansas law for local exchange service with the state.[4] Although this letter is in reference to a specific docket, the RUS position is directed toward general telecommunications policy. RUS notes that a carrier that seeks universal service funding on the federal level must meet federal ETC requirements. RUS respectfully submits that a carrier that seeks state universal service funding should be obligated to meet state ETC requirements regardless of whether the carrier is otherwise subject to state regulation. The mode of transmission should not reduce the service expectations of Kansas consumers or the conditions for receiving universal service support.

RUS Has Always Been a Wireless Proponent

RUS has been a long time proponent of using wireless technologies to solve rural telecommunications problems. RUS was part of a coalition that won approval for using mobile telephone frequencies (from a cellular predecessor technology known as IMTS) for fixed station telephone service.[5] Recently, RUS has adapted its regulations so that providers other than local exchange carriers can receive financing for mobile service in rural areas.

While much more capable wireless systems are on the horizon for rural areas, this Agency views today's wireless and wireline technologies as separate and distinct services meeting different needs. Current cellular radio technologies were not designed to evolve over time. They provide voice service with extremely limited data capability. Wireline plant, properly configured, is an evolvable technology with capabilities ranging from voice to broadband.

The RUS believes that mobile service is important in rural areas and wishes to promote its availability but the Agency is concerned that current cellular services are unable to provide customers "access to advanced services" as required by Section 254 of the 1996 Act.[6] RUS

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telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."

3. Section 254(f) provides that "(a) state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms."

4. *See* Kansas Statute 66-2011 (b): "All rural telephone companies, including local exchange carriers pursuant to subsection (c), shall provide dial-up access to support at least 14.4 kilobit per second service ubiquitously throughout the exchange service area, with 19.2 kilobit per second service on and after July 1, 1999."

5. IMTS stands for *Improved Mobile Telephone Service.* In the 1980s, the FCC began allowing IMTS spectrum s to be used on a secondary basis for fixed station telephone service know as *Basic Exchange Telephone Radio Service* or BETRS.

6. *See supra* note 1.

focus on advanced services, in fact, preceded the 1996 Act. RUS has been required by law to promote advanced services (including 1 megabit/second data rates) since 1993.[7] Because we believe mobile technology fulfills a different need and is not a substitute or duplication of local exchange service, the Agency specifically exempted wireless services from having to meet that data requirement. However, under RUS regulations, if a wireless service were to be used as a substitute for local exchange service, it would have to meet the data requirement to be eligible for financing.

No Carrier Should Have To Compete On a Split-Level Playing Field

Since the passage of the 1996 Act, much attention has been focused on creating a level playing field for all competitors (competitive neutrality), and on ensuring that regulators do not favor a specific technology (technological neutrality). Should Kansas exercise its authority to permit competitive entry in the areas served by rural carriers, it should be careful to not allow some carriers to avoid rules that apply to other competitors or ignore technology-imposed service capability. A split-level playing field, where one competitor must play on one level with one set of rules, while another is allowed to play on a different level with different rules, could profoundly affect the quality of telecommunications in rural Kansas and throughout rural America.

Kansas has a history of promoting modern service in rural areas. That progress should be treasured and preserved. Under the 1996 Act, States have extra discretion to ensure that competitive entry in the areas served by rural LECs will meet the public interest.

A Policy of Competitive Neutrality Requires That Competitors Play by the Same Rules

The Kansas Corporation Commission (KCC) has enacted commendable and reasonable local service standards for its LECs.[8] Kansas law requires these Kansas supported services to be available to "every Kansan," and the KCC has required all LECs in the state to comply. The result has been national leadership by Kansas rural carriers. These standards particularly benefit rural citizens because urban plant is inherently easier to adapt to higher data rates.[9] The KCC's authority to establish standards over and above those adopted by federal regulators is codified in the 1996 Act, and Kansas has an intrastate universal service support mechanism to support these standards. The RUS believes that incumbent local exchange carriers and new competitors, regardless of the technology employed, should play on a level field where one set of rules is in effect, and where the referees are the KCC.

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7. Rural Electrification Loan Restructuring Act, Pub. L. No. 103-129, 107 Stat. 1356, codified at 7 U.S.C. 902 *et seq.* *See* §935(d)(3) regarding requirements for State Telecommunications Modernization Plans and the requirement that customers be able to transmit and receive data at a rate of 1,000,000 bits per second.

8. *See supra* note 3.

9. National Telecommunications and Information Administration, U.S. Department of Commerce, and Rural Utilities Service, U.S. Department of Agriculture, *Advanced Telecommunications in Rural America* (April 2000) at 12-13.

In this docket, one cellular mobile radio service (CMRS) provider argues that it does not have to play on this level of the field. It claims that it is not a LEC and because it is subject only to federal regulation as a CMRS provider, does not need to meet these standards. As an example of how CMRS providers are treated differently under the 1996 Act, this provider cites Section 332, Mobile Services, that states that "[a] person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll service."[10]

The CMRS carrier is correct in that a state can not require CMRS carriers to meet higher state service standards. However, this carrier is seeking state ETC status, not CMRS status. Nothing in federal law prohibits states from adopting competitively neutral universal service eligibility requirements applicable to all. Federal CMRS status is license to operate within a state, not license to automatically be eligible for state universal service funds.

The FCC has adopted a common denominator of service standards for eligible telecommunications carrier (ETC) designation, and a CMRS carrier can perhaps argue that it should only have to meet these standards to receive *federal* support.[11] But the KCC has adopted a higher set of standards for telephone service for LECs as permitted by the 1996 Act, and as a consequence, ETC LECs must meet these standards for Kansas universal service support. Such higher levels of service are laudable and producing positive results. Kansas has examples of the finest telecommunications service in the nation. For a level playing field to exist (competitive neutrality), competitors must meet the same standards. If not, wireline ETCs in Kansas are placed at a competitive disadvantage because the technology they employ to serve customers causes them to operate under service standards that CMRS providers can choose to ignore.

Federal law allows carriers to be eligible for federal universal service support by providing service over its own facilities or over its own facilities in combination with those of another carrier. A CMRS provider can choose to meet Kansas' standards by combining its services with another carrier's services.

RUS believes that it would be unwise to level the playing field be lowering service standards for all. The most prudent course to preserve and advance universal service in Kansas is to link eligibility for Kansas universal service support to one high standard. RUS recognizes that geography, topography, or economic feasibility may prevent any carrier, incumbent or competitor, from meeting current standards. In these discrete and limited cases, the standard should be the same for all carriers serving that area.

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10. *See* 47 U.S.C. 332(c)(8).

11 The RUS believes these to be a set of *lowest* common denominators of services available today. *See* RUS Exparte Comments to the FCC on redefining voice grade access, filed April 11, 2000, at http://www.usda.gov/rus/telecom/telecomact/2000actdocs.htm

Advanced Services - A Policy of Technological Neutrality Cannot Ignore Technological Limitations

Sections 254 and 706 are designed to promote technological advancement. The implementation of Section 254 is to be based on clear principals designed for the preservation and *advancement* of universal service. Prominent among these principals is that access to advanced services be available in all regions of the nation.[12] In addition, universal service is defined as an evolving level of telecommunications services established periodically by the FCC.[13] States are specifically allowed to adopt service requirements beyond those required under the federal mechanism as long as they provide specific, predictable, and sufficient support that does not rely on or burden the federal mechanism.[14] Finally, in Section 706, the FCC and the States are charged with encouraging the deployment of advanced telecommunications.[15] Based on the totality of Sections 254 and 706, it is clear that Congress intended that advanced services will be an ever more important part of the universal service that is to be preserved and advanced.

CMRS is not currently advanced services capable. A more important question is whether it ever will be. The answer to that question is almost certainly "no." The cellular technology employed by the CMRS provider is a narrow-band, voice-oriented technology built with almost no provision to evolve over time as contemplated by the Act. The provider suggests that that it will supplement the existing technology with Local Multipoint Distribution Service (LMDS) at some point in the future,[16] but this is not an evolutionary step. It would require a wholesale overlay and reengineering of the entire system including the customer equipment. LMDS operates in a frequency range which gives it a service radius of only about 3 or 4 miles, which might require 100 times as many cells as does CMRS in the lowest density areas. Finally, LMDS is an emerging technology, the economics of which are highly speculative. It cannot be assumed that LMDS would be feasible in every area in which they seek to obtain universal service support. Ignoring the question of spectrum availability, such a wholesale overlay is at best a possibility.

A carrier that seeks universal service funding on the federal level must meet federal ETC requirements and should be expected to meet future requirements in a timely manner as they evolve. Likewise, a carrier that seeks state universal service funding should meet state ETC requirements and should be expected to meet future state requirements in a timely manner as they evolve. Otherwise, universal service funds serve the perverse purpose of encouraging the

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12 *See supra* note 2.

13. Section 254(c)(1) states that "(u)niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services."

14. *See supra* note 3.

15. Telecommunications Act, *supra* note 4. Section 706(a) provides that "(t)he Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

16. *See supra* note 9 at 15-16 and 27 for a description of Local Multipoint Distribution System.

construction of new roadblocks to broadband. Such a result would be inconsistent with Section 254 and 706 of the 1996 Act.

Current CMRS carriers may provide a service that meets today's federal definition of supported service but have little prospect of meeting Kansas' requirements or any expected advanced services requirements at either the federal or state level. Because Section 254 mechanisms must both preserve *and advance* universal service, it can not be in the public interest to use universal service support to encourage the building of new technological roadblocks to the future or of devolving rather than evolving the network..

Kansas' Policy of Supporting only the Primary Line Combined with "Split-Level Rules Could Devaste Rural Service

One of the characteristics of the Kansas intrastate universal service support mechanism is that it only supports one line per customer (the primary line). This policy is based on the assumption that the incremental cost of a second line is quite small compared to the primary line. However, this assumption is not true when a customer receives service from both a wireless and a wireline carrier.

This policy, if coupled with the split-level playing field would be a serious threat to universal service in rural areas. With a little competitive imagination, a carrier could evolve from a player operating under easier rules enforced by distant referees, to a nefarious competitor. A wireless carrier is not under rate regulation and could choose to reward its customers for designating it the primary carrier with pricing incentives or by not offering the service except as a primary line. For example, the CMRS carrier with ETC designation under a "split-level" regime could offer the service only to customers who designate their service as the primary line. The wireline ETC could not do this without KCC approval. If a CMRS carrier sweeps up the bulk of available state support and leaves the incumbent with state and federal carrier-of-last-resort responsibilities, it would only be a matter of time berfore wireline service would suffer and collapse.

Internet Access is another serious area of concern. According to the U.S. Department of Commerce, 38.9% of rural households now have Internet access.[17] Current cellular technology can only be expected to provide about 9.6 kilobits-per-second, which is simply not acceptable to the vast majority of users. It can be expected that current internet customers would still need to subscribe to a wireline service to obtain reasonable internet access. If a customer subscribes to a wireline service in addition to the CMRS provider's universal service package, the wireline carrier would receive no intrastate support for its line.

In a competitive environment, a competitor may drive the incumbent out of business. In effect, the KCC could be in the position of using state support to subvert its own service requirements. Under Kansas law, a LEC is required to provide ubiquitous 19.2 kilobit/second service capability

17. National Telecommunications and Information Administration, U.S. Department of Commerce, *Falling Through the Net* (October 2000).

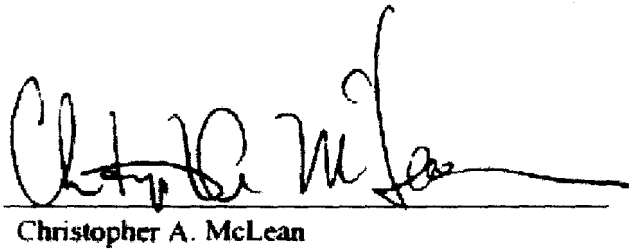
in its service area[18] whether or not a customer chooses to use the circuit for data. If a non-LEC can win a large percentage of the "voice-only" customers and the associated universal service support, it may be impossible for that LEC to continue to provide more sophisticated services to its remaining customers.

It is not enough to say that this problem can be addressed if it happens. If three, five, or seven years down the road, an unregulated CMRS provider drives the LEC out of business, the state may gain the power to regulate that CMRS provider as a LEC, but no amount of regulation will change the CMRS technology so that it is capable of providing advanced services.

Conclusion

A split-level playing field makes fair competition impossible. A policy of competitive neutrality requires that competitors play by the same rules. A policy of technological neutrality cannot ignore technological differences in capability and evolvability. Kansas' policy of support only for the primary line, a policy abandoned by the FCC, if combined with a split-level regime, can have devastating consequences for universal service when the primary and secondary lines are obtained from different facilities with differing capabilities.

States, as a practical matter, may have to abandon service modernization progress made over the years to prevent destruction of the LECs they regulate. If rural carriers lose customers, in effect, they become carriers serving lower density areas, which increases costs whether they are computed with a proxy model or embedded costs. The results of this are increased costs of universal service support for both federal and state systems, less revenue for the carriers to modernize plant, and ultimately higher customer rates for lower quality, less capable, and less reliable service. Most rural service areas cannot sustain the resulting losses and some carriers serving them will fail. If those failures occur among the carriers who can provide advanced services and enhanced services, and the surviving carriers are unable to provide these services, serious harm will occur to customers in those areas.



11/3/00

Christopher A. McLean
Administrator, Rural Utilities Service

Date

18. Kansas Statute 66-2011 (b) provides that "(a)ll rural telephone companies, including local exchange carriers pursuant to subsection (c), shall provide dial-up access to support at least 14.4 kilobit per second service ubiquitously throughout the exchange service area, with 19.2 kilobit per second service on and after July 1, 1999."